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Paper No. 9
TEH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **La Femme Cosmetics, Inc.**

Serial No. 75/656,217

Michael a. Painter of Isaacman, Kaufman & Painter for La Femme Cosmetics, Inc.

William P. Jacobi, Trademark Examining Attorney, Law Office **110**
(Chris A.F. Pedersen, Managing Attorney).

Before Walters, Holtzman and Drost, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

La Femme Cosmetics, Inc. has appealed from the final refusal of the Trademark Examining Attorney to register the mark shown below for goods which were amended to read:

Cosmetics, namely, skin cleansing lotion, concealer, cuticle remover preparation, eye shadow, eye liner, eyebrow pencil, facial scrub, false eyelashes and adhesive therefor, hand and body lotion, lipstick, lip gloss, lip liner, liquid and cream foundation, loose and pressed powder, facial masques, skin moisturizing lotion, nail decals, nail polish, nail polish remover, replenishing cream, rouge and toner.¹

¹ Application Serial No. 75/656,217, filed March 8, 1999 alleging dates of first use and first use in commerce of August, 1957.

The application includes an English translation of "LA FEMME" as "the woman" or "the wife."

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark FEMME in typed form for "cosmetic and toilet preparations; namely, perfume and cologne"² as to be likely to cause confusion.³ The cited registration contains a translation of FEMME as "woman, mature woman, married woman, wife, female attendant, lady."

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods or

² Registration No. 1,825,704; issued March 8, 1994; Sections 8 and 15 affidavits accepted and acknowledged, respectively.

³ The Examining Attorney had initially refused registration also under Section 2(e)(1) of the Act. That refusal was subsequently withdrawn.

services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976) and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

Turning first to the goods, the Examining Attorney argues that applicant's cosmetics and registrant's perfume and cologne are closely related products, and that they move through the same channels of trade to the same purchasers. In support of his position, the Examining Attorney has made of record copies of eight third-party registrations covering both types of products under the same marks. Applicant, on the other hand, argues that perfume and cologne, products which affect scent or odor, are different from "cosmetic products," which affect appearance. Applicant maintains that the respective products, channels of trade, and users are "totally divergent" and that "when tested against the standard of association or 'complementary use' there is no relationship between the goods."

It is true that there are specific differences in the respective products. They do not have identical properties and they are not interchangeable. However, the question is not whether purchasers can differentiate the goods themselves but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the goods of the applicant and registrant be similar or even

competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Applicant's cosmetic products on the one hand, and registrant's perfume and cologne, on the other, are all related products. Indeed, the complementary nature of these products is obvious. Notwithstanding the different product characteristics, they all constitute preparations which are typically used as part of an everyday beauty or personal grooming regimen and, as neither the application nor registration contains any limitations as to channels of trade or class of purchasers, we assume that these products travel through the usual trade channels to the general consumer. Moreover, the third-party registrations show, in each instance, a mark which is registered for both registrant's products, perfume and cologne, and one or more of applicant's products.⁴ Although the third-party registrations are not evidence of use of the marks in commerce, the

⁴ We note that none of these registrations involve house marks for broad or diverse categories of goods.

registrations have probative value to the extent that they suggest that the identified goods are of a type which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, supra at 1785-1786; and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). We also note that all of the broadly identified goods herein encompass items that may be relatively inexpensive and therefore likely to be purchased casually and on impulse, thus increasing the risk of confusion. *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146, 227 USPQ 541, 542 (Fed. Cir. 1985). See also, e.g., *Mary Kay Cosmetics, Inc. v. Dorian Fragrances, Ltd.*, 180 USPQ 406, 407 (TTAB 1973) [wherein the Board noted that perfumes are available to the general public in stores which cater to those of expensive tastes and in drug stores which cater to persons of all tastes].

It is clear that consumers would be likely to believe that cosmetic products, and perfume and cologne emanate from or are sponsored by the same source if such goods are sold under the

same or similar marks.⁵

⁵ The Examining Attorney also points out that the Board, in at least two published cases, has found that the use of same or similar marks in connection with these types of products would be likely to cause confusion. See *Mary Kay Cosmetics, Inc. v. Dorian Fragrances, Ltd.*, supra and *Capri Cosmetics, Inc. v. Nina Ricci S.A.R.L.*, 142 USPQ 361 (TTAB 1964).

Thus, we turn our attention to the marks. Applicant argues that the marks, when considered in their entirety, are distinguishable because "[t]he words 'LA FEMME' and the specific stylized form are integral parts of [applicant's] composite mark" and create a different commercial impression from registrant's mark. Applicant maintains that registrant's mark "is weak" and conveys "a different appearance and meaning from [applicant's] mark." In this regard, applicant notes that "[a]lthough the word FEMME may have originally been translated from the French language, it is defined in the English dictionary" and appears to argue that "femme" is a common English word and as used in the registration merely conveys its common meaning.⁶ Applicant has requested that the Board take judicial notice of an English dictionary showing that "femme" is an English word. However, no definition for the word has been provided. Nevertheless, for purposes of this decision, we will assume that the word is defined in at least one English dictionary.

While marks must be compared in their entirety, there is nothing improper in giving more or less weight to certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight.

⁶ In making this argument applicant relies on *In re Merchandising Motivation, Inc.*, 184 USPQ 364 (TTAB 1974), wherein the Board stated that "...when the alleged appropriated mark is a common English word and that word as used in a party's composite mark merely conveys its

See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). The respective marks FEMME and LA FEMME (stylized), when compared in their entireties, are similar in appearance, and virtually identical in sound, meaning and overall commercial impression. The strongest impression of applicant's mark is conveyed by the word "FEMME." That same word is registrant's entire mark. The term LA is the equivalent of the French article "the" and as such does not significantly affect the commercial impression of applicant's mark or the English or foreign language meaning the mark conveys. See, e.g., In re Central Soya Company, Inc., 220 USPQ 914, 916 (TTAB 1984). In fact, the translated meanings of the respective marks in the application and registration are nearly identical. The registration contains a translation of FEMME as, inter alia, "woman" or "wife" and applicant has translated its own mark LA FEMME in the application as "the woman" or "the wife." If anything, the combination of LA and FEMME simply reinforces the French flavor of the mark and enhances its similarity to the French word in registrant's mark.

Moreover, the wording in applicant's mark is given greater weight than its stylization because the words would be used by purchasers to request the goods and they are therefore more

common meaning...then the trademark is not incorporated into the composite mark."

likely to be remembered by purchasers. See *In re Appetito Provisions Co.*, supra. In this case, the stylization of applicant's mark results only in a modest visual difference in the marks which, if it is remembered at all, is not sufficient to differentiate one mark from another. In addition, registrant's mark, presented in typed form, is not restricted to any particular style of lettering, and thus may be used by registrant in the same stylization used by applicant. See *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 1041, 216 USPQ 937, 939 (Fed. Cir. 1983).

The point is that while there are minor visual and phonetic differences in the marks, these differences are not likely to be recalled by purchasers seeing the marks at separate times. Under actual marketing conditions, consumers do not necessarily have the opportunity to make side-by-side comparisons between marks. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255 (TTAB 1980). Thus, purchasers familiar with applicant's stylized mark LA FEMME, upon seeing registrant's mark FEMME on related goods, are likely to be confused inasmuch as both marks have the same connotation.

While the word FEMME may be suggestive in relation to the identified goods, we have no evidence that the word is commonly used in the cosmetic or related fields, or any other evidence in the record to suggest that "femme" is weak, or entitled to a

narrow scope of protection.⁷ However, applicant appears to argue that because "femme" can be found in the English dictionary, the word is weak. It is not entirely clear, but it appears to be applicant's contention either that its own mark would be recognized as a French term because of the French article LA whereas registrant's mark would not; or that the combination of the French article LA and the English word FEMME in applicant's mark somehow creates an incongruity which changes the commercial impression of applicant's mark and distinguishes its mark from registrant's mark. Either way, applicant's argument fails.

Although there is a listing for the word "femme" in at least one English dictionary, the evidence of record does not establish that "femme" is primarily an English word. Rather, as applicant recognizes, the origin of the word is from the French language. We also note that both the registration and application file contain English translations of "femme" as a foreign language word. See, e.g., *In re Bonni Keller Collections Ltd.*, 6 USPQ2d

⁷ Applicant, for the first time with its appeal brief, identified two third-party registrations for marks which include the word "femme." The Examining Attorney's objection to this evidence is well taken. The registrations are untimely, having been introduced after the filing of the appeal. See Trademark Rule 2.142(d). In any event, the Board does not take judicial notice of third-party registrations, and the mere listing of them is insufficient to make them of record. See *In re Duofold*, 182 USPQ 635, 640 (TTAB 1974). Accordingly, the third-party registrations have not been considered. Even if considered, the registrations would not be persuasive of a different result in this case.

1224 (TTAB 1987) and *In re Le Sorbet, Inc.*, 228 USPQ 27, 29 (TTAB 1985). More important, while the word "femme" may have entered the English language, there is no evidence that the word is in common use in the English language or even that relevant purchasers are familiar with the word.⁸ The mere appearance of a term in a dictionary does not establish that the term is known to an appreciable number of Americans. See *E.I. du Pont de Nemours and Co. v. Sunlyra International Inc.*, 35 USPQ2d 1787, 1789 (TTAB 1995) ["If all words and terms found in dictionaries and other reference works were generally known to the American public, the need for such dictionaries and reference works would be exceedingly small."].

In view of the foregoing, we conclude that consumers familiar with registrant's perfumes and cologne sold under its mark FEMME would be likely to believe upon encountering applicant's stylized mark LA FEMME for cosmetic products, that the goods originated with or are somehow associated with or sponsored by the same source.

Decision: The refusal to register is affirmed.

⁸ For this reason, among others, applicant's reliance on *In re Merchandising Motivation, Inc.*, 184 USPQ 364 (TTAB 1974) is misplaced.

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